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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
The Petition of the State of Minnesota)
1996 Acting by and Through the Minnesota)
Department of Transportation and the)
Minnesota Department of)
Administration, for a Declaratory Ruling)
Regarding the Effect of Sections 253(a),)
(b) and (c) of the Telecommunications)
Act of 1996 on an Agreement to Install)
Fiber Optic Wholesale Transport)
Capacity in State Freeway Rights-of-Way)

CC Docket No. 98-1

**OPPOSITION OF MINNESOTA TELEPHONE ASSOCIATION
TO**

REQUEST FOR DECLARATORY JUDGMENT

**REQUEST OF MINNESOTA TELEPHONE ASSOCIATION
FOR PREEMPTION**

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Date: March 9, 1998

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SUMMARY

The State of Minnesota seeks a Declaratory Ruling from the Commission approving an agreement which gives exclusive rights to a single contractor to construct fiber optic communications facilities along 1,050 miles of interstate highway for at least 10 years, with a possible extension by the contractor for another 10 years. The requested Declaratory Ruling would insulate that agreement from further review under Section 253(a) notwithstanding impacts on specific entities or specific services throughout this 10 to 20 year period. In return for the exclusive right to utilize the most commercially viable inter-city right-of way in the state, the contractor is required to provide to the State free use of at least 20% of the lit fiber optic facilities to be installed, plus 10 dark optical fibers.

Because the Agreement is an unlawful barrier to entry, the Commission must deny the petition for Declaratory Ruling. Instead, it should issue an order preempting the unlawful restriction. The Agreement violates Section 253 of the Communications Act in several respects.

1. The Exclusive Freeway Use Provision will have the “effect of prohibiting the ability of [many entities] to provide interstate [and] intrastate telecommunications services” in violation of Section 253(a). Section 253(a) applies, contrary to the opinion of the State, to restrictions on the construction of “infrastructure”, which is used to provide telecommunications services. The “carrier’s carrier” services to be provided by the contractor will be “telecommunications services” to which Section 253(a) applies, the State’s opposite view notwithstanding. The State’s attempt to justify the exclusive arrangement through statewide market analysis is unavailing because of the impact on services to and between communities located along the freeway rights-of way and because Section 253(a) applies to rules that restrict

“the ability of any entity to provide any telecommunications service.” Nor is there any distinction in Section 253(a) between restrictions on “new” and “existing” uses of rights-of way, contrary to the State’s position.

The Agreement will have the effect of prohibiting other entities from providing telecommunications services because the State’s exclusive contractor will incur substantially lower costs as a result of its exclusive control of the freeway rights-of-way, which are the most direct and most commercially viable routes between the major telecommunications markets in the State. The competitive value of this monopoly franchise is confirmed by the provision of the Agreement that permits the Company to cancel if the exclusive use is not legally upheld.

In direct contrast to the agreement, the essence of open entry, contemplated by the Telecommunications Act of 1996, is every entity’s freedom to choose to enter a market by building facilities or leasing them from a competitor. The State’s exclusive arrangement frustrates this essential option for entities who wish to compete with the State’s chosen contractor in providing high capacity transport services to other carriers and for other services. Nor is the Agreement saved by a one-time opportunity to co-locate facilities during construction, which is inadequate for existing entities and totally unavailable for entities formed in the future.

2. The Exclusive Freeway Use Provision is neither “competitively neutral” nor “necessary” within the meaning of Section 253(b). Because the exclusive use substantially benefits one entity at the expense of any other competitor, it cannot be a “competitively neutral” legal requirement. Neither can it be found “necessary” to protect universal service, public safety, quality of service, or consumer rights. The vastly less restrictive approach to freeway right-of-way use taken by other states and the absence of any national standards calling for exclusivity both demonstrate that public safety can be accomplished in far less restrictive ways. The State

broadly asserts, but entirely fails to establish, any valid public safety or traveling public convenience concerns which require restriction of access to freeway rights-of way to a single provider. Rather, the exclusive use was clearly intend to enhance the competitive and market value of the freeway rights-of-way and thus maximize cost savings achieved by the State's bartering exclusive use of its right-of way for free communications service.

3. Neither the Exclusive Freeway Use Provision nor the compensation arrangement proposed by the State (payment of usage charges to the Company) are "competitively neutral and nondiscriminatory" right-of way management or compensation within the meaning of Section 253(c). The right assured state and local governments to manage rights-of way and secure compensation cannot be used to thwart the competitive goals of the Act. Beyond the problems discussed under Section 253(a) and (b), the provision in the Agreement directing compensation to the holder of the exclusive license adds insult to injury.

For these reasons, the request for declaratory ruling should be denied and implementation of the exclusive freeway use provisions of the Agreement should be preempted.

I. INTRODUCTION

The following Opposition to Request for Declaratory Judgment and Request Petition for Preemption are submitted on behalf of the Minnesota Telephone Association ("MTA") in response to the *Petition of the State of Minnesota For a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications 1996 Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way* (the "State Petition" or "St. Pet.").¹ The MTA is a statewide association comprised of 88 local exchange carriers providing telephone exchange service in Minnesota.

The Minnesota Department of Transportation ("MnDOT") has granted a ICS/UCN, LLP (the "Company") the exclusive rights to install fiber optic facilities along the length ("longitudinal use") of approximately 1050 miles of the freeway rights-of-way in Minnesota by agreeing to exclude any other entity from installing fiber optic facilities for a period of at least 10 and up to 20 years after completion of fiber installation under Section 11.1 of the Agreement ("Exclusive Freeway Use Provision"). The Exclusive Freeway Use Provision violates Section 253(a) of the Telecommunications Act of 1996 (the "1996 Act")² and does not meet the requirements of either Sections 253(b) or (c). Accordingly, the Commission should deny the Petition for a Declaratory Ruling and should preempt the Exclusive Freeway Use Provision under Section 253(d).

¹ The Petition relates to the *Agreement to Develop and Operate Communications Facilities by and Among the State of Minnesota, acting by and through the Commissioner of the Department of Transportation and the Commissioner of the Department of Administration* ("the State"), ICS/URN LLC, a Colorado limited liability company (the "Company") and STONE & WEBSTER ENGINEERING CORPORATION, a Massachusetts corporation ("S&W"), dated December 23, 1997 (the "Agreement").

² Pub. L. No. 104-104, 110 Stat. 56, amending the Communications Act of 1934, 47 U. S. C. § § 151 *et. seq.*

II. THE STATE'S GRANT OF EXCLUSIVE FREEWAY USE VIOLATES SECTION 253(a).

Section 253(a) establishes the basic requirements applicable to State and local authorities, as follows:

- (a) No state or local statute or regulation, or other state or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The Exclusive Freeway Use Provision constitutes a “legal requirement”³ that will have the “effect of prohibiting” the ability of numerous entities to provide both interstate and intrastate telecommunications services.

The State argues that the Exclusive Freeway Use Provision will not have the “effect of prohibiting” the ability of other entities ability to provide telecommunications services.⁴ To the contrary, the Exclusive Freeway Use Provision will have that effect because the State is granting to the Company an exclusive preference to use the most direct and least costly routes between communities along the freeway rights-of way, which include most of the major population centers in Minnesota. That exclusive preference will allow the Company to avoid significant costs and burdens resulting from more difficult construction, indirect routing and purchase of

³ The State appears to recognize that the Exclusive Freeway Use Provision provisions of the Agreement constitute a “legal requirement.” In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, CCB Pol 96-26, MEMORANDUM OPINION AND ORDER, Released: July 17, 1997, 12 FCC Rcd. 14191 (“Huntington Park”) establishes that a “contract” can be a “legal requirement” reading in part:

“[T]he City’s contracting conduct would implicate Section 253(a) . . . if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the central business district. In other words, the City’s contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider . . .”
(Emphasis added.) Id. at 14209, ¶ 38.

⁴ State Petition, pp. 4, 17-19

easements that have been and will be encountered by other entities using other routes. Other entities will either: 1) incur substantially higher costs than the Company to provide service to or between communities along the freeway rights-of way; or 2) be required to use the Company's facilities. Such uneven treatment has the effect of prohibiting the ability of other entities to provide telecommunications service, in violation of Section 253(a).

A. Prior Decisions of the Commission Establish Both the Process and Substantive Criteria for Review.

The Commission has a clearly established process for review under Section 253. First, the Commission determines whether there is a violation of Subsection 253(a). If so, then the Commission determines whether the violation is permitted under Subsections 253(b) and/or (c).⁵ If the legal requirement violates Section 253(a) and does not meet the criteria of Sections 253(b) or (c), the Commission is obligated to preempt under Subsection 253(d).⁶

⁵ In the Matter of The Public Utility Commission of Texas , et al, CCB Pol 96-13 et al, MEMORANDUM OPINION AND ORDER, Commission 97-346 , Released: October 1, 1997 ("PUC of Texas") reads in part:

Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). (Emphasis added.) At ¶ 42.

In the Matter of TCI CABLEVISION OF OAKLAND COUNTY , INC., CSR-4790 , MEMORANDUM OPINION AND ORDER Commission 97-331 Released: September 19, 1997, 12 FCC Rcd. 21396 ("Troy") reads in part:

Parties seeking preemption of a local legal requirement such as the Troy Telecommunications Ordinance must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). (Emphasis added.) At 21440, ¶ 101.

See also In the Matter of Silver Star Telephone Company, CCB Pol 97-1 , MEMORANDUM OPINION AND ORDER Released: September 24, 1997 ("Silver Star") at 12 FCC Rcd. 15639, 15647 ¶ 37.

⁶ Section 253(d) reads in part:

The Commission has also established substantive criteria to determine whether a legal requirement has the "effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" under Section 253(a).⁷ As further discussed below, the Commission recognizes that Section 253(a) bars legal requirements: 1) that restrict the entity's choice of using its own facilities or the facilities of another provider; 2) that materially increase the costs of some entities without necessity; or 3) that materially inhibit the ability of an entity to compete in a fair and balanced legal and regulatory environment. For the reasons set forth below, it is clear that the Exclusive Freeway Use Provision violates each of these criteria of Section 253(a). Further, the Exclusive Freeway Use Provision does not meet the criteria of either Subsections 253(b) or (c). As a result, the Commission should deny the Petition for Declaratory Ruling and the Commission should preempt the Exclusive Freeway Use Provision pursuant to Subsection 253(d).

(d) If . . . the Commission determines that the State or local government has permitted or imposed any statute, regulation, or legal requirement that violates Section (a) or (b), the Commission shall preempt the enforcement of such statutes, regulations, or legal requirements to the extent necessary to correct such violation or inconsistency. (Emphasis added.)

The Commission has confirmed in PUC of Texas, that preemption is required if the prohibition is either explicit or as the result of a "practical effect," saying in part:

In sum, section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. (Emphasis added.) ¶ 22.

⁷ See, In the Matter of Classic Telephone, Inc., CCB Pol 96-10, MEMORANDUM OPINION AND ORDER, FCC 96-397, Released: October 1, 1996 11 FCC Rcd. 13082 at 13094 ("Classic"); In the Matter of New England Public Communications Council, CCB Pol 96-11, MEMORANDUM OPINION AND ORDER, FCC 96-470 Released: December 10, 1996, MEMORANDUM OPINION AND ORDER (on Petition for Reconsideration), Released: April 18, 1997, 11 FCC Rcd. 19713 at 19720 ("New England"); Huntington Park; Troy; Silver Star; and PUC of Texas.

B. The State Excluded Only Competing Fiber Optic Providers From Longitudinal Use Of Freeway Rights Of Way For the sole Purpose Of Maximizing the Amount of Free Capacity It Would Receive.

The Agreement and related documents clearly demonstrate that the State purposely:

1) established the foundation for an auction of the freeway rights-of-way by deciding to allow only one provider to have access; and 2) chose this method not to promote public safety and convenience, but to maximize the economic value of the rights-of way and economic benefit to the State resulting from the barter of exclusive access for free communications capacity. The 1996 Act, however, does not allow a State to achieve cost savings by imposing discriminatory legal requirements that have the effect of prohibiting other entities' ability to compete.

1. The barter of the State's promise to exclude other fiber optic providers in return for free capacity is the core of the Agreement.

Both the Agreement and the underlying Request for Proposal (the "RFP")⁸ demonstrate the State's overriding intent to barter exclusive access in return for free fiber capacity. Federal Highway Administration publications demonstrate that exclusivity is primarily a mechanism for enhancing the economic value of the freeway rights-of-way and maximizing the cost savings to the State and that safety considerations can be, and have been, fully addressed by methods that do less harm to competition.⁹

The essence of the transaction was reflected in the RFP which focused on the exclusivity of the access being provided.¹⁰ The Agreement confirms this focus in the State's explicit

⁸ See, Exhibit 1 attached, Request for Proposals dated February 20, 1996.

⁹ See, Exhibit 2 attached, U.S. Department of Transportation Report #FHWA-JPO-96-0015, April 1996. **Shared Resources: Sharing Right-of-Way for Telecommunications – Guidance on Legal and Institutional Issues** by Apogee Research, Inc and including Nossaman, Gunther, Knox & Elliot and Dr. Thomas Horan ("1996 FHWA Report")

promise to prevent other entities from installing fiber optic facilities along the length (“longitudinal use”) of approximately 1,050 miles of freeway in Minnesota, including mileage for which the Company has the option, but not the obligation to install its fiber.¹¹ In return for the State’s promise to exclude other providers of fiber optic facilities, the Company is required to provide to the State, free of charge, 20% of the “lit” capacity of the fiber optic facilities that is installed by the Company, plus 10 dark fiber optic strands.¹²

The State’s promise to exclude other providers of fiber optic facilities will last for at least 10 years¹³ and may be extended by the Company (by right of first negotiation) if the State

¹⁰ The RFP reads in part:

Goal

MnDOT wants to develop a public-private partnership venture with communications infrastructure providers and operators to exclusively enter, install and develop communications primarily within state freeway right-of way, in exchange for providing operational communications capacity to the state.

Objectives

...
d) Provide the successful bidder exclusive rights to MnDOT freeway right-of way for commercial communication infrastructure purposes.

...
MnDOT wishes to barter exclusive rights to freeway right-of way in exchange for capacity to satisfy immediate and future state needs.

At p. 1

2. Guidelines for Fiber Optics

MnDOT will consider providing exclusive use of its freeway right-of way to the successful proposer. No other private use of fiber optic lines will be permitted on the freeways other than the system that now exists along I-94 between St. Cloud and Maple Grove.

At p.3.

¹¹ Agreement Section 11.1(a)

(a) State hereby agrees that it shall not grant a license, permit or other right to any other party to construct, install and operate a fiber optic communications system longitudinally within the Freeway Right of Way locations specifically identified on Table F of Exhibit A, including any portion of the Optional Phase I Routes for which Company validly exercises its option in accordance with Section 5.11(a). ... (Emphasis added)

¹² See, Agreement, Section 3.3(a)(ii), (b)(i), and (c).

¹³ Agreement, Section 11.1

(b) The right granted under subsection (a) above shall expire on the first to occur of (i) ten years after the last Acceptance Date for Phase 1 or (ii) termination of this Agreement for any reason.

proposes any additional longitudinal installations of fiber along the freeways within the period beginning 10 years and ending 20 years following completion of the Initial Construction.¹⁴ As a result, the period of Exclusive Freeway Use Provision available to the Company could last as long as 20 years after the completion of the initial phase of fiber installation by the Company.

The fact that the market value of the freeway right-of-way will be enhanced by imposing a requirement of exclusivity is apparent from the 1996 FHWA Report, which reads in part:

Shared resource projects also differ significantly from other auction situations because more than one lessee can be accommodated in the same right-of-way. In all cases documented to date in this study, the highway right-of-way can physically accommodate *all* lessees interested in longitudinal access. Thus, competitive auction may be a practical option only if access will be granted exclusively to a single lessee.

(Emphasis original.) Exhibit 2. At § 4.1.2. As discussed further below, the approach taken by other states and the latitude granted by both national standard setting organizations and the FHWA show that safety considerations can be addressed by means less restrictive than exclusive access.

2. The economic and competitive advantage of the Exclusive Freeway Use Provision is confirmed by other terms of the Agreement.

Both the State and the Company recognize that the Exclusive Freeway Use Provision provides to the Company a significant competitive advantage beyond the value of a secure, but non-exclusive, use of right-of way.

¹⁴Agreement, Section 11.1

(e) If at any time during the period commencing ten years and expiring 20 years after the last Acceptance Date for Phase 1 State desires to offer the opportunity to place an additional fiber optic communication system within any Freeway Right of Way location specifically identified on Table F of Exhibit A ... Company shall have a first right of exclusive negotiation with the State for the design, permitting and installation of such fiber optic system. (Emphasis added)

The Agreement reflects recognition of this competitive advantage in: 1) terms that allow the Company to cancel the Agreement if its Exclusive Freeway Use Provision is invalidated by any federal or state decision;¹⁵ 2) the State's acknowledgment of the significance of the Exclusive Freeway Use Provision to the Company's ability to finance the project;¹⁶ and 3) the State's reservation of full rights to allow longitudinal use of the freeway by entities who will not compete with the Company's fiber facilities, including other utilities and radio communications providers.¹⁷ If the Company was not receiving a significant competitive

¹⁵Agreement, Section 15.1

- (b) Company shall have the right to terminate this Agreement ..., if:
- (i) a State constitutional amendment or State Law or Regulation shall take effect after the Agreement Date which:
- (A) is specifically directed at this project or specifically at the fiber optic telecommunications industry in the State and creates an adversely disproportionate impact on Company and/or S&W, this Agreement, the proposed Network or access to substantial lengths of Right of Way for longitudinally installing fiber optic cable systems, and
- (B) materially impairs Companys' rights respecting the Network granted in Section 11.1,[the term giving exclusive rights to use] materially impairs Company's rights (as restricted, limited and conditioned) under this Agreement ... to impose and collect fees and charges from the users of the Network ...
- (Emphasis added)

Section 15.2

- (a) Each of (1) State and (2) Company shall have the right to terminate this Agreement ... in the event of ...
- (iii) a material adverse decision in any litigation or administrative proceeding concerning the validity of Section 11.1 (including but not limited to any decision in another case which sets firm precedent under similar facts and circumstances against the validity of Section 11.1)
- ...
- (c) Company shall have the tight to terminate this Agreement ... if:
- (iv) a constitutional amendment or Law or Regulation having the same purpose, scope and effect as described in Section 15.1(b)(i) is placed into effect by the United States or any local government ...

¹⁶ Agreement, Section 11.1

- (a) State and Company also acknowledge that the foregoing covenant will assist Company in financing development of a Network which reaches rural areas of Minnesota.

¹⁷ Agreement, Section 3.1

- (b) The exercise of Company's and S&W's right granted in subsection (a) ...is limited and conditioned by, among other provisions set forth in this Agreement, the following:
- ...

advantage over other entities, the possible loss of exclusivity would not be an explicit basis for cancellation of the Agreement.

The Agreement's careful focus to exclude only other fiber optic providers clearly demonstrates the State's intent to grant to the Company a competitive advantage that is far different than the benefit obtained from non-exclusive use of right-of way. Reserving the State's right to allow installation by other utilities also seems inconsistent with the State's claim that public safety considerations require only one user of the freeway rights-of-way.

The State's recognition of the competitive advantage granted to the Company is underscored in the State Petition which includes a request for expedited consideration based on the State's admission that the Company will probably be unable to secure financing unless the Commission grants a Declaratory Ruling that the Exclusive Freeway Use Provision is lawful under the 1996 Act.¹⁸ If the Company was not receiving a significant competitive advantage over other entities, its exclusivity would not be so critical to financing.

(iii) the paramount right of MnDOT to possess, control and utilize Right of Way as permitted by Laws and Regulations, including but not limited to the right to grant Permits to others pursuant to the Utility Accommodation Policy, with the benefit, however, of Sections 11.1 [which excludes other fiber providers]

...

(Emphasis added)

¹⁸ The State Petition reads in part

An expedited ruling is essential to the long-term financing and implementation of the project, and the achievement of the project's significant public benefits. Because of the importance of this issue [legality of exclusive use] to the project, the Developer is unlikely to attract the investment necessary prior to the Commission review. Investors, the State and Developer need greater assurance before plans to lay nearly 2,000 sheath miles of fiber can be fully implemented. At p.9.

These admissions thoroughly refute the State's assertions that other sources of right-of-way provide equivalent opportunities to competitors of the Company.¹⁹

3. The substantial benefit conferred on the Company will harm competition and individual competitors.

The attached Affidavit prepared by Strategic Policy Research ("SPR") explains with specificity why the exclusive right-of-way grant by the state is unnecessarily restrictive and anticompetitive.²⁰ SPR's examination of the arrangement, including the availability of less restrictive means of protecting public safety, led it to conclude that exclusive access is not necessary to protect the public safety or minimize traffic disruption. Rather, the agreement would foreclose both wholesale and retail competition along the best intercity routes in the state, and does not have adequate safeguards against anti-competitive abuse.

SPR demonstrates the flaws in the state's market analysis, showing that instead of the state-wide wholesale market, the relevant markets are those the cities along the interstate highways. Fiber is, after all, location specific: a Minneapolis to Duluth fiber cannot substitute for a St. Cloud to Fargo/Moorhead fiber. SPR also shows that the exclusive arrangement will inhibit entry of new providers and inhibit development of innovative service offerings by current and future providers by foreclosing access to the most efficient route system, all to the expense of consumers.

¹⁹ The disadvantages to a service provider forced to build over alternative rights of way are discussed as Section D.4 infra.

²⁰ See, attached Exhibit 3.

C. Section 253(a) Applies To The Exclusive Freeway Use Provision.

The State offers several alternative arguments attempting to show that Section 253(a) is not applicable to the Exclusive Freeway Use Provision. To the contrary, it is clear that Section 253(a) does apply.

1. Section 253(a) applies to legal requirements that restrict the installation of “infrastructure.”

The State Petition rests heavily on the State’s erroneous assertion that the 1996 Act applies only to restrictions on services and not to State-imposed restrictions on the deployment of “infrastructure.”²¹ To the contrary, Section 253(a) is not limited by the manner in which the “effect” is achieved or characterized by the State. This conclusion is supported by: a) the plain language of Section 253(a); b) the easy evasion of Section 253(a) that would be possible under the State’s argument; and c) prior decisions of the Commission.

a) The plain language of Section 253(a) shows that the “effect” on other entities is the critical factor.

Section 253(a) is plainly phrased in terms of the “effect” a legal requirement has on the ability of any other entity to provide services. Section 253(a) reads in part:

“No ... legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any ... telecommunications service.”

Section 253(a) does not create any exception for “legal requirements” directed to limiting infrastructure, and there is no indication that application of Section 253(a) depends on the State’s intentions, how that State characterizes its actions, or how it accomplishes the prohibition. As the Commission has noted, the term “telecommunications service,” is defined in Section 153 (46)

²¹ State Petition, pp. 4, 13-17

“regardless of the facilities used.” Use of that term in Section 253 (a) clearly indicates that application of that section reaches restrictions on facilities usage.²²

b) The State’s argument would facilitate evasion of Section 253(a).

If a State could prevent application of Section 253(a) by characterizing its restrictions as applying to the “installation of infrastructure,” Section 253(a) could be easily evaded. Evasion would be easy because the ability of many entities to provide many telecommunications services can, in effect, be “prohibited” (i.e., made infeasible) if the cost of building infrastructure needed to provide those services can be deliberately inflated over the cost of a competitor. Congress’ intent to eliminate such restrictions could be easily frustrated if restrictions on infrastructure were outside the scope of Section 253(a).

c) Prior decisions of the Commission refute the State’s argument.

Contrary to the State’s position, the Commission’s decisions in Huntington Park, Troy, and PUC of Texas clearly demonstrate that Section 253(a) applies to legal requirements addressed to the installation of facilities.

PUC of Texas involved requirements that CLECs install their own facilities. In PUC of Texas, the Commission preempted the requirement to install facilities because it restricted that provider’s choice of facilities.²³

²² PUC of Texas at ¶ 74

²³ In PUC of Texas, the Commission said in part:
We preempt enforcement of these requirements because they restrict the means or facilities through which a party is permitted to provide service in violation of section 253. (Emphasis added) at ¶ 13.

Thus, we find that the six percent eligibility limitation no longer effectively prohibits these carriers from providing any telecommunications service through the means of their choice in violation of section 253. (Emphasis added) at ¶ 14.

Huntington Park limited the installation of equipment (payphones) in a downtown business district. While the Commission did not preempt the legal requirements in Huntington Park, that decision was not based on any belief that Section 253(a) did not apply to restriction on infrastructure. Rather, in Huntington Park there was no evidence that any person was restricted in installation of its facilities in the Central business district.²⁴

Troy involved restrictions imposed on the installation of CATV facilities in the rights-of-way. In Troy, the Commission did not preempt because the petitioning CATV provider had withdrawn its application.²⁵ There was no indication that restrictions on infrastructure installation were outside the scope of Section 253(a).

The Commission also indicated in both Huntington Park and Troy that if facts arose demonstrating the prohibited effect on competitors, the Commission would preempt in the future.²⁶ Had the State's position that infrastructure restrictions are outside of the scope of section

In reaching this decision, we find that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options. ... (Emphasis added) at ¶ 74.

²⁴ Preemption was denied because the challenged contract was not exclusive by its terms and there had been no showing that it was exclusive in application. The Commission said:

On the foregoing record, we cannot conclude that payphone service providers other than Pacific Bell lack a realistic opportunity to contract with the City to install payphones outdoors on the public rights-of-way in the Central Business District. The Payphone Agreement expressly permits such Contracts; the City officially avows its willingness to alter such contracts; the City apparently has never rejected such a proposed contract or required prohibitive terms; and the only supporting information adduced -- after five rounds of written submissions -- is one declaration purporting to describe unofficial conversations with one City employee.

Huntington Park, 12 FCC Rcd. at 14208 ¶ 37.

²⁵ 12 FCC Rcd. at 21396.

²⁶ The Commission further said:

... If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably "prohibits or has the effect of

2539a) been correct, there would have been no basis for the Commission to reserve the right to revisit the issue of preemption in the future.

d) Use of the term “infrastructure” in Section 259 is not inconsistent with application of Section 253(a) to legal requirements that restrict development of infrastructure.

The State incorrectly asserts that use of the term “infrastructure” in Section 259 (and not Section 253) shows restrictions on infrastructure construction outside of the scope of Section 253(a). (St. Pet. p 16). To the contrary, the use of the term “infrastructure” in Section 259 narrows the scope of the Section, but does not infer that Section 253 should be so narrowly construed for several reasons.

First, Section 259 is derived from earlier stand-alone legislation that dealt explicitly with, and was specifically intended to promote, infrastructure sharing among LECs with different levels of economies of scale. The stated purpose of Section 259 is to allow the smaller LEC to provide telecommunications services, but it is not to require sharing of services. Section 253, on the other hand, as the central provision implementing the pro-competition intent of the 1996 Act, has a broader scope which proscribes any type of restriction on the provision of services, whether or not there is a restriction on the construction of infrastructure. The word “infrastructure” is used in Section 259 and not directly in Section 253 because “infrastructure” restrictions are necessarily encompassed within the prohibition on requirements that have the “effect” of prohibiting an entity from providing service.

prohibiting” the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.

Huntington Park, 12 FCC Rcd. at 14209 ¶ 38

Second, the State's argument is fundamentally inconsistent with the plain language of Section 253(a), which rests on the "effect" on other entities, not the manner in which a State chooses to accomplish such an "effect." The use of the term "service" in Section 253, and in Congressman Holden's floor speech does not, in any way, imply that flat prohibitions on facilities construction, applicable to all but one competitor, would be permitted under Section 253(a).

Third, the State's position is inconsistent with prior decisions of the Commission. As previously discussed, if the State's position was correct, the Commission's decisions in Huntington Park, Troy and PUC of Texas would have been unnecessary, since each involved legal requirements related to infrastructure. The use of the term "infrastructure" in Section 259 was no obstacle to the Commission's analysis of the effect of these various infrastructure restrictions under Section 253(a).

2. The services to be provided by the Company are "telecommunications services" within the meaning of the 1996 Act and scope of Section 253(a).

The State argues that the Company will not provide service to the public and will provide only wholesale or "carriers' carrier" services, that such services are not "telecommunications services" and that, as a result, Section 253 does not apply. (St. Pet. pp. 4, 14.) To the contrary, the wholesale service to be provided by the Company meets the definition of "telecommunications services," and is subject to Section 253.

The 1996 Act defines the term "telecommunications service" to include not only service directly to the to the public, but also service to "such classes of users as to be effectively available directly to the public."²⁷ The use of this term encompasses the historical test of service

²⁷ Section 153(51) reads:

to the public which has been called “common carriage” in the past (and which remains in the 1934 Act, as amended).²⁸ While private carrier services are not telecommunications services, an undertaking to serve the class of all carriers or even some classes of carriers is a “telecommunication (or “common carrier”) service.”

The Agreement clearly indicates that the carriers’ carrier service to be provided by the Company is telecommunications service. Further, both the affiliates of the Company and the state itself will provide telecommunications service using facilities to be provided under the Agreement. The “class of users” that the Company will provide service to includes all “telecommunications service providers.”²⁹ Within this class of users, the Company is required to act as a common carrier, including the offering uniform and non-discriminatory rates and charges to all customers and publishing such rates and charges.³⁰ Although there are significant incentives for the Company to discriminate in favor of its Related Parties and a total absence of enforcement mechanisms, it is clear that the intent is to make a common carrier offer to the class

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

²⁸Section 153 (44) makes clear that a provider of telecommunications service is to be treated as a common carrier.

²⁹ Agreement, Sec. 3.1(b)(vii) provides:

Company ...shall have the right to use the Network only and solely for the purpose of providing to the State and to telecommunications service providers, including Company Related Parties, transport capacity, via lit or dark fibers and ancillary services for voice, video and data transport and transmission intrastate and interstate.

³⁰Agreement, Sec. 7.7 reads in part:

- (a) At all times throughout the Term Company shall maintain, offer, accept, implement and adhere to written, uniform and non-discriminatory rates and charges for all similarly situated customers and potential customers for such customer’s rights to use or access the Network or to become Collocating Customers. ...
- (b) ...
- (c) At Company’s expense, State shall publish Company’s classifications, rates and charges for use of or access to the Network

of telecommunications service providers who will, in turn, make an offer of their service to the general public.

The State's argument appears to assume that only offers directly to the public can be "telecommunications service," in effect ignoring the possibility of an offer to certain "classes of users" which in turn make the service available to the public. To the contrary, the fact that service is provided on a wholesale basis to the class of other carriers clearly does not prevent application of Section 253(a). For example, exchange access is offered by incumbent LECs to inter-exchange carriers as a regulated, tariffed service. Offering exchange access as a tariffed service demonstrates that wholesale provision of service (to other carriers) is not inconsistent with common carriage. Further the tariffing of high capacity transport services, such as DS-1 and DS-3 services, similarly shows that offering high capacity services can be common carriage.

The State cites Atlantic Express³¹ and NorLight³² for the proposition that the FCC does not regulate wholesale transport providers as common carriers. (St. Pet. p. 14.) Neither case supports the State's contention. To the contrary, both cases involved factual situations in which the respective carriers' services were offered on a distinctly private and discriminatory basis. In direct contrast, here the essence of the State's argument is that no other carrier will be competitively disadvantaged because the Company will offer any other carrier capacity on nondiscriminatory terms and conditions. (St. Pet. p. 26.)

³¹ 11 FCC Rcd. 7033 (1996).

³² 2 FCC Rcd. 132 (1987).